

ASSOCIATED PAN MALAYSIA CEMENT SDN BHD

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v.

SAFUDIN PEER BUX

HIGH COURT MALAYA, PULAU PINANG

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JEFFREY TAN J

[ORIGINATING MOTION NO: 25-53-1998]

19 JANUARY 2001

LABOUR LAW: *Employment - Transfer - Refusal to take transfer letter - Whether tantamount to insubordination - Whether a misconduct warranting dismissal*

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LABOUR LAW: *Employment - Misconduct - Abusiveness, insolence and utterance of threats - Whether justified*

LABOUR LAW: *Employment - Dismissal - Punishment of - Whether excessive in circumstances*

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ADMINISTRATIVE LAW: *Judicial review - Remedies - Certiorari, application for - Industrial Court - Whether decision tainted with irregularities*

The respondent, Safudin, a packing plant operator, was transferred to a different section by the applicant company. A meeting followed between the works manager and the respondent. At this meeting the respondent was alleged to have firstly, refused to take the transfer letter; secondly, used derogatory and abusive language against the said manager; and thirdly, had threatened the said manager. Following this, the respondent was subsequently dismissed.

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The matter came before the Industrial Court ('the IC') where it was held that the respondent had been unfairly dismissed. The IC however found that the respondent was also to be blamed and deducted 30% from the compensation awarded ('the said award').

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The applicant company applied to this court for a *certiorari* to quash the decision of the IC, contending that the tribunal had erred in its findings. It was argued that the tribunal was inconsistent where it found that the respondent had been dismissed unfairly on one hand and then state that he had committed the misconduct on the other. It was also contended that the IC had taken into account irrelevant matters in coming to its decision.

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a Held:

- [1]** For all intents and purposes, the respondent had accepted the transfer letter and had obeyed the transfer directive. His refusal to take the transfer letter could not be perceived as insubordination.
- b [2]** The IC had not been inconsistent in their finding. The conclusion in the said award was consistent with the finding that the misconduct made out was not misconduct warranting dismissal.
- c [3]** The IC ought to have considered the utterances in totality. It was manifestly obvious that the utterances, even if not said to a superior officer, were derogatory and abusive. When the respondent forwarded them to his superior officer, he was insolent as well.
- d [4]** Although it was clear that the respondent had misconducted himself, the punishment of dismissal was unduly harsh, considering that he had obeyed the transfer order and had served the company for a long time.
- [5]** On the third charge, there was no evidence that the words “jaga sikit” had been uttered in the context of bodily harm.
- e [5a]** Given the order of the utterances, it might well have been that the said words tantamount to a caution to the said manager to adhere to the company’s procedure.
- [5b]** The said words could be perceived either way as evidence leading to the context in which it was uttered was not clear cut. However, it would have been wrong to resolve that which was inclusive in favour of the applicant.
- f [6]** The IC had decided fairly in the circumstances and had taken into account such issues which were relevant to the dispute in question.

g *[Application dismissed with costs.]***Case(s) referred to:**

Council of Civil Service Unions v. Minister for the Civil Service [1985] AC 374 (**refd**)
Express Nasional Bhd v. Md Nor Yahya [1992] 1 ILR 154 (**refd**)
Kumpulan Perangsang Selangor Bhd v. Zaid Hj Mohd Noh [1997] 2 CLJ 11 (**refd**)
h *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 (**refd**)
Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 (**refd**)

For the applicant - Vijaya Venugopal; M/s Shearn Delamore & Co
For the respondent - Augustine Anthony

i *Reported by Maheswaran Murugasen*

JUDGMENT

Jeffrey Tan J:

This is an application for an order of *certiorari* to remove into the court for the purpose of it being quashed the award of the Industrial Court (IC) delivered on 30 April 1998. Briefly stated, the IC held (i) that the dismissal of the respondent (a member of the Cement Industry Employees Union and an employee of the applicant) was dismissed without just cause and excuse, (ii) that the respondent committed misconduct, (iii) that reinstatement would not be the right remedy. Furthermore, the IC ordered, (iv) that the respondent be paid backwages (being RM1,245 x 22 months), (v) that the respondent be paid compensation *in lieu* of reinstatement, ie, one month salary for each completed year of service (being RM1,245 x 21 years), (vi) that the applicant do pay the respondent any other benefits had the respondent not been dismissed, and, (vii) that 30% of RM53,701 be deducted from the total sum of RM53,701 payable to the respondent, for misconduct. The background facts should be apparent from the following summary or the arguments of learned counsel.

Mr Vijaya Venugopal submitted as follows. The respondent, a packing plant operator who had taken 62 days medical leave between 1 January 1995 to 31 October 1995, was required by the applicant to undergo a full medical test. The result from the medical test was that the respondent was fit to discharge his duties. To lessen the high incidence of medical leave taken by the respondent, the applicant decided to transfer the respondent to the Property Maintenance Section, where normal working hours were maintained. On 20 October 1995, the applicant issued a letter transferring the respondent to the Property Maintenance Section. On 26 October 1995, the respondent saw the works manager over his transfer. At that meeting between the respondent and works manager on 26 October 1995, the respondent exhibited conduct warranting his dismissal. The charge letter against the respondent reads as follows:

That you on 26.10.1995 at about 1.25 p.m. in the Works Manager's office you refused to accept the letter which has been given to you earlier by your section Head. You refused to accept the letter and during the conversation you used derogatory and abusive language against the Works Manager. You also verbally threatened the Works Manager.

Mr Vijaya submitted that the elements of the charge were: (i) refused to accept the letter of transfer, (ii) used derogatory and abusive language, and, (iii) threatened the works manager. The IC found, that the respondent had refused to accept the letter of transfer. However, the IC misdirected itself on the further finding that the refusal to accept the letter of transfer was not misconduct. The IC misdirected itself when it held that refusal to take the letter from the

- a* manager's table was the misconduct alleged by the applicant. The refusal to accept the letter of transfer was the misconduct alleged by the applicant. The finding of the IC that refusal to take the letter alone was not conduct warranting dismissal was wrong. Refusal to accept a transfer would amount to misconduct warranting dismissal. The misconduct – the refusal to accept transfer and the use of abusive language – was similar to the misconduct in *Express Nasional Berhad v. Md Nor bin Yahya* [1992] 1 ILR 154. The IC should have considered the total misconduct and not just one misconduct in isolation.
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- c* On the 2nd and 3rd elements of the charge, Mr Vijaya submitted that the IC found that the respondent had used the words “you are not fit for the job”, “tak guna punya orang”, “tidak ikut procedure”, and the IC accepted the evidence that the respondent had uttered the words “jaga sikit”. However, the overall conclusion of those findings was wrong. There was no evidence supporting the conclusion that the words “jaga sikit” were uttered in the context of divine intervention.
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- On the punishment for the alleged misconduct, Mr Vijaya contended that r. 5 of the Rules of Management permitted the applicant to dismiss the respondent, on the ground of insubordination. The court should not interfere with the punishment of the employer.
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- Mr Vijaya further contended (i) that the IC had failed to take into account the past record of the respondent, (ii) that the IC had taken into account an irrelevant matter – the manner of conduct of the domestic inquiry, (iii) that the IC was inconsistent – the IC held that the respondent was dismissed without just cause and excuse and also held at the same time that the respondent had committed misconduct. Mr Vijaya further contended that the award was so perverse, being so inconsistent and without justification, that no reasonable tribunal could have made such an award.
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- g* Mr Augustine Anthony for the respondent did dispute the background facts. He even agreed that some findings of the IC could not be supported. However, he said that no substantive injustice was done. What was important was the misconduct. The deduction of 30% was not an error in law. There was some misconduct, but it was not just to dismiss the respondent merely because he uttered some derogatory words. Dismissal was harsh. The IC was right in finding that the respondent was wrongly dismissed. The respondent's conduct was not riotous. There was no disobedience; the transfer was obeyed. Misconduct was taken into account in the award. The discretion to fix the compensation lies with the IC. The award should not be quashed or remitted to the IC.
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Mr Vijaya replied that the IC had not given any reasons for the deduction of 30%. He finally submitted that the award, if there was anything wrong with it, should be quashed or remitted to the IC.

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Apparently, the applicant assumed that the alleged misconduct was misconduct warranting dismissal, and that proof of the three elements of the alleged misconduct was proof of misconduct warranting dismissal.

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Rightly or wrongly, that was the impression of the court, as Mr Vijaya listed the elements of the alleged misconduct and painstakingly pointed out each of the affirmative findings of the IC to those three elements. But it is true, that the IC held, (i) that the respondent had “refused to take the transfer letter from COW1’s table” (see para 20 of the award), (ii) that refusal to take the letter from the manager’s table was not misconduct warranting dismissal (see para 21 of the award), and, (iii) that the respondent had uttered the words, “you are not fit for the job”, “tak guna punya orang”, “tidak ikut procedure” (see para 25 of the award). It is true as well that the IC held, (iv) that the respondent had also uttered the words “jaga sikit” (see paras 26 & 27 of the award), and (v) that the respondent was dismissed without just cause or excuse but that there was misconduct.

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And yes, it is also true, that refusal to accept the letter of transfer was the misconduct alleged by the applicant, and that refusal to take the letter from the manager’s table was not the misconduct alleged by the applicant. Still, notwithstanding the difference in some words, is there any material difference between the two? Given the circumstances of the case, is not the meaning of the words “refusal to take the letter from the manager’s table” the same as the words “refusal to accept the letter of transfer”? Given the particulars of the charge, are not the words “refusal to take the letter from the manager’s table” more accurate than the words “refusal to accept the letter of transfer”? Indeed, is not “refusal to take the letter of transfer” the alleged misconduct? On one fact there could be no query – the alleged misconduct was not “refusal to accept the transfer”, in the sense of refusal to be transferred, as the respondent had complied with the transfer directive (see para 20 of the award). There could not have been any misconduct by reason of refusal to be transferred to the Property Maintenance Section. That discounted, it just means that the alleged misconduct was “refusal to accept the letter of transfer”, or to be more accurate, “refusal to take the letter of transfer”. The IC had not misdirected itself when it held that refusal to take the letter from the manager’s table was the alleged misconduct.

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- a* What about the finding that refusal to take the letter alone was not conduct warranting dismissal? For all intents and purposes, the respondent had accepted the letter of transfer. He reported to the Property Maintenance Section on 1 November 1995, as directed. He only refused to take the letter of transfer. There was no insubordination, in the sense of refusal of the transfer.
- b* The refusal to take the letter of transfer was not any serious misconduct; it ought not to have been taken so seriously. With respect, the applicant was just petty. The bottom line, was compliance or non-compliance with the transfer directive. Notwithstanding his conduct, the respondent had obeyed the transfer directive. The refusal to take the letter of transfer was rather trivial. It was certainly not any misconduct warranting dismissal.
- c* Was the IC also right in finding that the dismissal was without just cause or excuse? Now other than the refusal to take the letter of transfer, the further misconduct alleged was (i) the use of derogatory and abusive language, and, (ii) the threat to the Works Manager.
- d* On the issue of the use of derogatory and abusive language, the IC clearly found that the respondent had uttered the words “you are not fit for the job”, “tak guna punya orang”, and, “tidak ikut procedure” (see para 25 of the award). The IC also accepted that the respondent had used the words “jaga sikit” to the works manager (see paras 26 & 27 of the award).
- e* On those proved utterances, the IC held that the words “jaga sikit” were spoken in the context of divine intervention and so was not a threat of bodily harm as alleged, but that the respondent committed misconduct when he uttered the words “you are not fit to be a Works Manager” to the works manager.
- f* The IC remarked, “the respondent had no business whatsoever to scold the works manager”, and, “the respondent had poured his anger and unhappiness (on the works manager)” (see para 29 of the award). For those reasons, the IC held it was misconduct (see para 29 of the award), but it qualified that “the (mis) conduct of the respondent was not that riotous as to have “(made) it impossible for COW1 to discharge his duties” (see para 30 of the award).
- g* At para 39, the IC concluded:
- the dismissal of the Claimant by the Company is without just cause and excuse.
The (IC) however agrees that the Claimant had committed misconduct.
- h* On that conclusion, Mr Vijaya contended that the IC was inconsistent. Indeed, it would appear at first blush, that the IC was inconsistent – finding on the one hand that the dismissal was without just cause and excuse, and finding on the other hand that there was misconduct. For would it not be argued, since there was misconduct, that the dismissal was with just cause and excuse? But would not that argument stand to reason, only if the misconduct was
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misconduct warranting dismissal? After all, not all misconduct is misconduct warranting dismissal. It would be wrong to assume that any misconduct is misconduct warranting dismissal. In the instant case, it would most certainly appear from paras 32 to 38 of the award, that the finding of the IC was that the misconduct was not misconduct warranting dismissal. The deliberation on the appropriate punishment in paras 32 to 38 of the award, and the deduction of 30% for misconduct, bear that out. The conclusion in para 39 of the award is consistent with the findings that the misconduct made out was not misconduct warranting dismissal. Evidently, there was no inconsistency.

Admittedly, the IC ought to have considered the utterances in totality. It is manifestly obvious that the utterances “you are not fit for the job”, “tak guna punya orang”, and, “tidak ikut procedure”, even if not said to a superior, were derogatory and abusive. When said to his superior, the respondent was insolent as well. Quite clearly, the respondent misconducted himself. The respondent could be punished. Yet, punishment must be fair. The respondent was a lowly worker. Refined language, probably, was beyond him. His derogatory and abusive language, if it could not be overlooked, could have been dealt with less harshly. Notwithstanding that he denigrated and abused his superior, the respondent did not defy the transfer. Unlike the claimant in Express Nasional Berhad, the respondent’s insubordination did extend to a refusal to carry out an immediate order. On 1 November 1995, he reported to the Property Maintenance Section, as directed. Furthermore, he had served the applicant for 21 years. All that counted in favour of the respondent. Dismissal is the ultimate punishment, and was harsh in the circumstances. It was not unreasonable of the IC who considered other mitigating circumstances to perceive it as harsh.

The remaining utterance “jaga sikit” was the bedrock of the charge that the respondent threatened the works manager. Sadly, it would appear once again that the respondent, or rather the works manager, had over-reacted. The applicant argued before the IC, that by those words the respondent threatened the works manager with bodily harm. But where was the conclusive evidence that the respondent threatened the works manager with bodily harm. The works manager clarified that the actual words uttered were, “jaga sikit, you know what happened to the other managers”. When asked as to what had happened to those managers, the works manager informed that “one passed away, and the other manager was terminated” (see para 26 of the award). Mr Vijaya contended that there was no evidence that could support the IC’s conclusion that the words “jaga sikit” were uttered in the context of divine intervention. Well, there was no evidence that the words “jaga sikit” were uttered in the context of bodily harm. The words “jaga sikit” were uttered after the utterances – “you are not fit for the job”, “tak guna punya orang”, and “tidak ikut procedure”. But when all utterances are considered in totality, it is neither clear

- a* nor obvious that the words “jaga sikit, you know what happened to the other managers” was a threat of bodily harm. Given the order of the utterances, it might well have been that the words “jaga sikit” was a caution to the works manager to follow procedure or to carry out his duties properly, or else he (works manager) could face the music. Admittedly, it might well have been
- b* a threat. But the case was not clear-cut. It would have been wrong to resolve that which was inclusive in favour of the applicant, the pursuer.

- The award was not perverse (for meaning of “perverse”, see *Kumpulan Perangsang Selangor Bhd v. Zaid bin Hj Mohd Noh* [1997] 2 CLJ 11). The award was not unreasonable (see *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748) nor irrational, in the sense that “it is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it” (*Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374 per Lord Diplock, as quoted in *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147, 172). Having reviewed the award for substance, it could not be said that no reasonable tribunal would come to the same conclusion.

- e* Granted, the IC failed to take into account the past record of the respondent. But how could that past record tip the scales in favour of the applicant. Already, for his absenteeism, the respondent had his wages deducted. The respondent’s annual increment was withheld for the three years in which his work performance was “below satisfactory”. On the other hand, there were years in which the work performance was “satisfactory”. The fact of the matter is that the instant misconduct was not misconduct warranting dismissal. The
- f* past record cannot change that fact. The past record was relevant only to the punishment. Reasonably, it should not alter the final outcome, for then it would be perverse to find, because of the past record, that the dismissal was with just cause and excuse, when in fact the misconduct was not misconduct warranting dismissal.

- g* Granted, the IC considered the domestic inquiry, an irrelevant matter, according to the applicant. But it was done with good reason. The IC considered the domestic inquiry for the purpose of determining the admissibility of the notes of the domestic inquiry (see para 15 of the award). The IC held that those notes were not admissible. The applicant had to prove its case to the IC. The
- h* applicant, other than being inconvenienced, was not prejudiced.

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Overall, the award was fair and reasonable. The total conduct of the respondent did not warrant dismissal, unless there is not to be some measure of social justice. There is no substantive injustice to be remedied. No reason was given for the quantum of the deduction. But the party who should complain is not complaining. Then it would be idle and it would not do any justice to reassess the quantum or remit the award back to the IC, because of the IC's failure to give reasons for the quantum of deduction.

For the above reasons, this application is dismissed with costs.

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